

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHARON L. SWAN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

NO: 12-CV-0559-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment (ECF Nos. 11 and 12). Plaintiff is represented by Maureen J. Rosette. Defendant is represented by Daphne Banay. This matter was submitted for consideration without oral argument. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the Court grants Defendant's motion and denies Plaintiff's motion.

1 JURISDICTION

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g);
3 1383(c)(3).

4 STANDARD OF REVIEW

5 A district court's review of a final decision of the Commissioner of Social
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is
7 limited: the Commissioner's decision will be disturbed "only if it is not supported
8 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
9 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means
10 relevant evidence that "a reasonable mind might accept as adequate to support a
11 conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently,
12 substantial evidence equates to "more than a mere scintilla[,] but less than a
13 preponderance." *Id.* (quotation and citation omitted). In determining whether this
14 standard has been satisfied, a reviewing court must consider the entire record as a
15 whole rather than searching for supporting evidence in isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its
17 judgment for that of the Commissioner. If the evidence in the record "is
18 susceptible to more than one rational interpretation, [the court] must uphold the
19 ALJ's findings if they are supported by inferences reasonably drawn from the
20 record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]
3 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).
4 The party appealing the ALJ’s decision generally bears the burden of establishing
5 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
13 “of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy.” 42 U.S.C. §
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(b); 416.920(b).

4 If the claimant is not engaged in substantial gainful activities, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. *Id.*

12 At step three, the Commissioner compares the claimant’s impairment to
13 several impairments recognized by the Commissioner to be so severe as to
14 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
16 severe than one of the enumerated impairments, the Commissioner must find the
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

18 If the severity of the claimant’s impairment does meet or exceed the severity
19 of the enumerated impairments, the Commissioner must pause to assess the
20 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),

1 defined generally as the claimant's ability to perform physical and mental work
2 activities on a sustained basis despite his or her limitations (20 C.F.R. §§
3 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the
4 analysis.

5 At step four, the Commissioner considers whether, in view of the claimant's
6 RFC, the claimant is capable of performing work that he or she has performed in
7 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv);
8 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
10 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the
11 analysis proceeds to step five.

12 At step five, the Commissioner considers whether, in view of the claimant's
13 RFC, the claimant is capable of performing other work in the national economy.
14 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
15 the Commissioner must also consider vocational factors such as the claimant's age,
16 education and work experience. *Id.* If the claimant is capable of adjusting to other
17 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
18 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
19 work, the analysis concludes with a finding that the claimant is disabled and is
20 therefore entitled to benefits. *Id.*

1 The claimant bears the burden of proof at steps one through four above.
2 *Lockwood v. Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
3 the analysis proceeds to step five, the burden shifts to the Commissioner to
4 establish that (1) the claimant is capable of performing other work; and (2) such
5 work “exists in significant numbers in the national economy.” 20 C.F.R. §§
6 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

7 ALJ’S FINDINGS

8 Plaintiff filed applications for disability insurance benefits and supplemental
9 security income disability benefits on July 25, 2009. Tr. 237-246, 247-250. These
10 applications were denied initially and upon reconsideration, and a hearing was
11 requested. Tr. 112-116, 133-135, 138-141, 144-145. Hearings were held before an
12 Administrative Law Judge on January 19, 2011, April 5, 2011, and September 16,
13 2011. Tr. 22-105. The ALJ rendered a decision denying Plaintiff benefits on
14 October 12, 2011. Tr. 19-32.

15 The ALJ found that Plaintiff meets the insured status requirements of Title II
16 of the Social Security Act through September 30, 2013. Tr. 24. At step one, the
17 ALJ found that Plaintiff had not engaged in substantial gainful activity since
18 November 15, 2008, the alleged onset date. *Id.* At step two, the ALJ found that
19 Plaintiff had severe impairments consisting of chronic diarrhea, refractory urge
20 incontinence, obesity, and painful wrist secondary to osteoarthritis. *Id.* At step

1 three, the ALJ found that Plaintiff's impairments did not meet or medically equal a
2 listed impairment. Tr. 25-27. The ALJ then determined that Plaintiff had the
3 residual functional capacity to:

4 perform light work as defined in 20 C.F.R. 404.1567(b) and
5 416.967(b) with the ability to: lift and/or carry and push and/or pull up
6 to 10 pounds frequently and 20 pounds occasionally; sit up to 6 hours
7 in an 8 hour work day with normal breaks; stand and/or walk at least 6
8 hours in an 8 hour day with normal breaks; and, occasionally stoop.
9 The claimant should only occasionally climb ramps, climb stairs,
10 kneel, crouch, crawl and never climb ladders, ropes or scaffolds. The
11 claimant should also avoid concentrated exposure to hazards, such as
12 machinery and heights. Furthermore, the claimant should be in close
13 proximity to a bathroom.

14 Tr. 27. At step four, the ALJ found that Plaintiff was able to perform her past
15 relevant work as an office assistant. Tr. 31. In light of this step four finding, the
16 ALJ concluded that Plaintiff was not disabled and denied her claims on that basis.
17 Tr. 31-32.

18 Plaintiff requested review by the Appeals Council and submitted additional
19 evidence, a vocational report from Robert Cornell. Tr. 292-306. The Appeals
20 Council denied Plaintiff's request for review on September 11, 2012, making the
ALJ's decision the Commissioner's final decision for purposes of judicial review.
Tr. 1-6; 20 C.F.R. §§ 404.981, 416.1484, and 422.210.

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ISSUES

Plaintiff raises three issues for review: whether the ALJ properly considered the opinion of a reviewing physician, Dr. Reuben Beezy (ECF No. 11 at 6-7, 9); whether the ALJ properly discounted Plaintiff's testimony regarding the "frequency with which she needed to use the bathroom throughout the day" (*id.* at 7-8); and whether a vocational expert was needed to "testify regarding [Plaintiff's] non-exertional limitations" specifically her need to use the bathroom frequently (*id.* at 7, 9-10).

DISCUSSION

A. Reviewing Physician's Opinion

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201 -1202 (9th Cir. 2001) (citations omitted) (brackets in original). Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing physician's. *Id.* In addition, the regulations give more weight to opinions that are explained than to those that are not, and to the opinions of specialists concerning matters relating to their specialty over that of

1 nonspecialists. *Id.* (citations omitted). A physician's opinion may be entitled to
2 little if any weight, when it is an opinion on a matter not related to her or his area
3 of specialization. *Id.* at 1203, n. 2 (citation omitted).

4 A treating physician's opinions are entitled to substantial weight in social
5 security proceedings. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
6 (9th Cir. 2009). If a treating or examining physician's opinion is uncontradicted,
7 an ALJ may reject it only by offering "clear and convincing reasons that are
8 supported by substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th
9 Cir. 2005). "However, the ALJ need not accept the opinion of any physician,
10 including a treating physician, if that opinion is brief, conclusory and inadequately
11 supported by clinical findings." *Bray*, 554 F.3d at 1228 (quotation and citation
12 omitted). "If a treating or examining doctor's opinion is contradicted by another
13 doctor's opinion, an ALJ may only reject it by providing specific and legitimate
14 reasons that are supported by substantial evidence." *Bayliss v. Barnhart*, 427 F.3d
15 at 1216 (*citing Lester v. Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995)). An ALJ
16 may reject a treating physician's opinion if it is based "to a large extent" on a
17 claimant's self-reports that have been properly discounted as incredible.
18 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (citations omitted).

19 Plaintiff argues that the ALJ failed to provide specific and legitimate reasons
20 for discounting Dr. Beezy's opinion that Plaintiff should have access to a bathroom

1 on an as-needed basis. Plaintiff observes that the ALJ gave great weight to Dr.
2 Beezy's opinion yet failed to include this limitation in his residual functional
3 capacity assessment.

4 Dr. Beezy testified he agreed Plaintiff was capable of light work (Tr. 59) and
5 she could maintain full-time work on a regular, continuous basis in a competitive
6 work environment (Tr. 60). With respect to her need to go to the bathroom, Dr.
7 Beezy testified that she should have access to a bathroom on an as needed basis.

8 Tr. 61-62. Dr. Beezy, a non-examining physician, then clarified his opinion:

9 It is hard for me to know how often she went to the bathroom. Her
10 symptoms seem to be worse at night anyhow. And you would think
11 that with probably medications, it shouldn't be a terribly significant
12 problem. I didn't see that it was more than moderate.

12 Tr. 62. The ALJ found:

13 Dr. Beezy opined there were likely some functional limitations due to
14 irritable bowel syndrome with chronic diarrhea . . . Yet, evidence also
15 showed she was negative for irritable bowel syndrome and there is an
16 indication medications or lactose intolerance contribute to her diarrhea
17 symptoms.

16 Tr. 29. The ALJ formulated his residual functional capacity assessment, as set
17 forth in full above, with the qualifier, "Furthermore, the claimant should be in
18 close proximity to a bathroom." Tr. 27.

19 In support of her arguments, Plaintiff cites to a January 4, 2011 medical
20 clearance letter from her treating urologist, Dr. Sayres, that reads, "This patient is

1 currently under my care for a medical condition that may require her to frequently
2 use the restroom.” *Id.*; Tr. 386 (emphasis added). Dr. Sayres’ statement does not
3 establish any greater limitation than the ALJ’s residual functional capacity finding.
4 As the ALJ correctly observed, “her treating source, William Sayres, M.D. stated
5 she had bowel issues consistent with IBS, but did not opine any greater restrictions
6 than what is accounted for in the residual functional capacity in this decision.”

7 The ALJ considered the medical opinion evidence in context and substantial
8 evidence in the record supports the ALJ’s residual functional capacity findings.
9 No error has been shown.

10 **B. Adverse Credibility Findings**

11 In social security proceedings, a claimant must prove the existence of
12 physical or mental impairment with “medical evidence consisting of signs,
13 symptoms, and laboratory findings.” 20 C.F.R. § 404.1508. A claimant’s
14 statements about his or her symptoms alone will not suffice. 20 C.F.R. §§
15 404.1508; 404.1527. Once an impairment has been proven to exist, the claimant
16 need not offer further medical evidence to substantiate the alleged severity of his or
17 her symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc).
18 As long as the impairment “could reasonably be expected to produce [the]
19 symptoms,” 20 C.F.R. § 404.1529(b), the claimant may offer a subjective
20 evaluation as to the severity of the impairment. *Id.* This rule recognizes that the

1 severity of a claimant's symptoms "cannot be objectively verified or measured."

2 *Id.* at 347 (quotation and citation omitted).

3 In the event that an ALJ finds the claimant's subjective assessment
4 unreliable, however, "the ALJ must make a credibility determination with findings
5 sufficiently specific to permit [a reviewing] court to conclude that the ALJ did not
6 arbitrarily discredit claimant's testimony." *Thomas v. Barnhart*, 278 F.3d 947, 958
7 (9th Cir. 2002). In making such a determination, the ALJ may consider, *inter alia*:
8 (1) the claimant's reputation for truthfulness; (2) inconsistencies in the claimant's
9 testimony or between his testimony and his conduct; (3) the claimant's daily living
10 activities; (4) the claimant's work record; and (5) testimony from physicians or
11 third parties concerning the nature, severity, and effect of the claimant's condition.

12 *Id.* The ALJ "must specifically identify the testimony she or he finds not to be
13 credible and must explain what evidence undermines the testimony." *Holohan v.*
14 *Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001).

15 The ALJ may "disregard self-serving statements made by claimants if it
16 finds them to be incredible on other grounds. Relevant factors can include the
17 claimant's engagement in activities inconsistent with a claim of disability, an
18 unexplained or inadequately explained failure to seek treatment, or other ordinary
19 methods of credibility determination." *Sousa v. Callahan*, 143 F.3d 1240, 1243
20 (9th Cir. 1998) (citations omitted).

1 Plaintiff argues that the ALJ did not provide clear and convincing reasons
2 for discounting her “testimony that she used the bathroom 30 times per day.” ECF
3 No. 11 at 8.

4 Here, the ALJ thoroughly recounted Plaintiff’s testimony that she could not
5 work because she had to go to the bathroom frequently; “she needed to go 30 times
6 a day,” she wore “Depends or pads in the day and night,” and “in an eight-hour day
7 she could only work half the time because she needed the remaining four hours to
8 go to the bathroom.” Tr. 28. The ALJ found:

9 [T]he claimant's statements concerning the intensity, persistence and
10 limiting effects of these symptoms are not entirely credible in finding
11 she is totally disabled. Furthermore, a trier of fact is required to
12 determine a witness' credibility in consideration of all the
13 circumstances, including her demeanor while testifying, her interest in
14 the outcome, the extent to which her testimony is contradicted or
15 corroborated by other evidence, and any other circumstances which
16 tend to shed light upon his credibility.

17 Tr. 29. The ALJ made a specific credibility finding, “Although the inconsistent
18 information provided by the claimant may not be the result of a conscious intent to
19 mislead, the inconsistencies suggest the information provided by the claimant
20 generally may not be entirely reliable.” Tr. 28. The ALJ noted several
inconsistencies, including that she claimed not to smoke or drink, yet the medical
records document as much during the relevant time period, and that she claimed

1 she could not lift more than two pounds, but then retracted this claim at the
2 hearing. *Id.*

3 Most significantly, the ALJ observed that her self-serving statements could
4 not “be objectively verified with any reasonable degree of certainty with objective
5 medical facts or diagnostic testing.” Tr. 29. In that regard, the ALJ found:

6 The undersigned is influenced by a treating source opinion he could
7 not continue to justify to her caseworker her not working and she had
8 not been consistent with follow-up recommendations. (See Ex. 1 F)
9 Furthermore, in 2011, her treating source, William Sayres, M.D.
stated she had bowel issues consistent with IBS, but did not opine any
greater restrictions than what is accounted for in the residual
functional capacity in this decision.

10 Tr. 30.

11 Having thoroughly reviewed the record, the Court finds that the ALJ’s
12 discounted credibility findings regarding the extent of Plaintiff’s limitations is
13 specific, clear and convincing and supported by substantial evidence

14 **C. Whether a Vocational Expert was Required at Step 4**

15 As a threshold matter, the Court finds that it may properly consider Mr.
16 Cornell’s report since the Appeals Council considered it in denying Plaintiff’s
17 request for review and incorporated it into the administrative record. Tr. 1-2, 5,
18 292-306; *see Brewes v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1162–63 (9th
19 Cir.2012) (“[W]e hold that when the Appeals Council considers new evidence in
20 deciding whether to review a decision of the ALJ, that evidence becomes part of

1 the administrative record, which the district court must consider when reviewing
2 the Commissioner's final decision for substantial evidence.”).

3 Plaintiff has the burden at step 4 to show that she is incapable of performing
4 her past relevant work. Accordingly, the Commissioner is not required to call a
5 vocational expert at this point in the sequential evaluation process. *Matthews v.*
6 *Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (since claimant failed to show that he
7 was unable to return to his previous job, the burden of proof remained with him
8 and while the vocational expert's testimony was useful, it was not required); *Miller*
9 *v. Heckler*, 770 F.2d 845, 850 (9th Cir. 1985) (The Secretary is required to produce
10 vocational evidence only when the claimant has shown that he or she cannot
11 perform any previous relevant work.).

12 The crux of Plaintiff's argument is that the ALJ allegedly did not include the
13 limitation that she needed to use the restroom 30 times a day. Having found the
14 Commissioner's rejection of that limitation to be free from legal error, this issue
15 concerning a vocational expert also fails.

16 ///

17 Accordingly, **IT IS HEREBY ORDERED:**

18 1. Defendant's Motion for Summary Judgment (ECF No. 12) is


19 **GRANTED.**

20 2. Plaintiff's Motion for Summary Judgment (ECF No. 11) is **DENIED.**

1 The District Court Executive is hereby directed to file this Order, enter
2 Judgment for Defendant, provide copies to counsel, and **CLOSE** the file.

3 **DATED** October 2, 2013.




THOMAS O. RICE
United States District Judge